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VALIDITY OF ASSIGNMENT FOR BENEFIT OF CREDITORS UNDER VIRGINIA BULK SALES ACT.

"An Act to prevent the fraudulent sale in bulk of merchandize, or any portion thereof, otherwise than in the ordinary course of trade" was passed in 1903.[1]

In 1916 the above act was amended by an act "to prevent the fraudulent sale in bulk of merchandize or any portion thereof otherwise than in the ordinary course of trade, and providing that the sale thereof shall be void." [2]

While the earlier acts provided that such "sale shall prima facie be presumed to be fraudulent and void," the Act of 1916 makes the "sale, transfer or assignment * * * void."

The word "void" must be construed as voidable.[3]

In the earlier acts the period for notice was ten days, while in the Act of 1916 the time is shortened to five days, and "fixtures" are included with merchandize.

In an assignment for the benefit of creditors the question has been raised as to whether compliance with the Bulk Sales Act of 1916 is necessary. If such a transaction were a *sale* it undoubtedly would be necessary to comply with its terms, but such a transaction is not a sale, but a surrender of property charged with contractual liens, created by the trust deed.

The Bulk Sales Laws of some States were held unconstitutional by their Courts of last resort upon Federal grounds, but the Michigan Act of 1905 in Kidd Dater Price Co. *v.* Musselman G. Co.,[4] and the Connecticut Bulk Sales Act having previously, in Lemieux *v.* Young,[5] been pronounced not obnoxious to the XIV Amendment, it is probable that the Legislature of Virginia in 1916 adopted the wording of the Michigan Act for that reason alone, the language of both acts being identical.

The purpose of the Legislature in enacting the Bulk Sales Laws, was to prevent the *fraudulent* disposition in bulk of merchandize and fixtures by an insolvent debtor to escape being made responsible to his obligations to his creditors who sold

1. Acts 1902-03, pp. 518-884. 2. Acts 1916, p. 713.
3. Coburn-Kelly Co. *v.* Cohen, 195 Mass. 585.
4. 217 U. S. 461. 5. 211 U. S. 489.

him the merchandize.[6]

It may have never occurred to the Virginia Legislature that "creditors" would be expounded to mean every creditor of the debtor.

However, "Suit under this section can only be instituted by a creditor existing at the date of sale." [7]

The Virginia Legislature may, however, not have been aware that in Michigan and Massachusetts, insolvency laws exist similar in many respects to the National Bankruptcy Act.

In Michigan it is enacted: "That all assignments commonly called assignments for the benefit of creditors shall be void, unless the same shall be without *preferences* as between such creditors." [8]

In Massachusetts the Pub. St. c. 157 Sec. 19, and Sec. 110 of 1902 Rev. Laws, enact:

> "If a person who is insolvent or in contemplation of insolvency * * * makes a sale, assignment, transfer or other conveyance of any part of his property to a person having reasonable cause to believe he is insolvent, or in contemplation of insolvency, * * * said sale or assignment shall be void. If such sale, assignment or transfer or conveyance is not made in the *ordinary course of business* of the debtor, that fact shall be prima facie evidence of such cause of belief." [9]

So that the transaction in Massachusetts which by its insolvency laws was voidable by *prima facie* evidence, like the earlier acts in Virginia by its Bulk Sales Law, is made void; yet, in Coburn-Kelly Co. *v.* Cohen,[10] the Massachusetts Court said that the purpose of its Bulk Sales Act, which was to prevent only fraudulent conveyances, was an addition to their laws against fraudulent conveyances, and that notwithstanding the use of the term "void" the transaction was voidable only.[11]

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6. Va. Law Reg., p. 682.

7. Trimble *v.* Covington, 112 Va. 826.

8. Compiled Laws of Michigan, 1897, Sec. 9539.

9. Rev. Laws Mass., pp. 1453-54.

10. Supra.

11. See Forbes *v.* Howe, 102 Mass. 427, and Milikin *v.* Hathaway, 148 Mass. 69; also Squire *v.* Tellier, 185 Mass., p. 18.

"In some States there are statutes expressly providing that a creditor may take from his debtor sufficient property to satisfy his claim, while in others statutes have been enacted prohibiting *preferences* under certain circumstances, and sometimes the prohibition is absolute." [12]

In Virginia "A debtor in failing circumstances may make a valid assignment for the benefit of his creditors, and he may make *preferences* as between them." [13] "And it is not necessary to the validity of such deed that the creditors should have been consulted before hand." [14]

Where the lien is charged on property in the deed of assignment, it being for the benefit of the debtor, where he has not expressly consented, the law will presume his assent, and make it a lien by contract. Where restrictions are placed in the deed of assignment to which some of the creditors do not give assent, it is their privilege to reject the provisions, but this does not avoid the charge or lien as to the other creditors, in the absence of fraud.

Not only need not the trustee and creditors secured in a deed of assignment comply with the Bulk Sales Law, but a creditor also who receives in Virginia from his debtor *bona fide* all, or a portion, of his stock by way of satisfaction of his debt, need not comply therewith.

Cases where creditors have received conveyances of merchandize in bulk from their debtors in satisfaction of their debt have been before the Courts of other States, and by the weight of authority such transaction is not a *sale*.

The case of Gallus *v.* Elmer,[15] while apparently holding a contrary view, although the Bulk Sales Act of Massachusetts is the only statute mentioned in the opinion of the Court, the insolvency laws of Massachusetts, which are discussed and applied in the cases of Forbes *v.* Howe and Miliken *v.* Hathaway,[16] governed and controlled that Court's decision in the former case.

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12. 12 R. C. L., p. 575.
13. Paul *v.* Baugh, 85 Va. 958.
14. Dance *v.* Seaman, 11 Gratt. 781; Skipwith *v.* Cunningham, 8 Leigh 271.
15. 193 Mass. 106.
16. Supra.

The following language of the Court applying the Bulk Sales Act is for that reason misleading:

> "We are of the opinion that the statute in question was intended to prevent a trader from disposing of his stock of merchandize in a manner outside of his usual course of business, so that the same should not be taken away from his creditors in general and that the transfer under the circumstances as disclosed in this case was a sale, though made to a creditor." [17]

There was no occasion for the Court in Gallus *v.* Elmer [18] to have pronounced the transaction a sale under the Bulk Sales Law even though it were equally applicable with the insolvency law of that State, and in the two following cases in Nebraska and Georgia the Courts of those States were evidently guided and misled by that language in the decision of the Massachusetts case.

> "The Bulk Sales Law does not prohibit the transfer of an entire stock of goods to a creditor in payment of a pre-existing debt, or to a trustee of certain creditors, but, in order to be valid, such sale or transfer must comply with the requirements of law." [19]

Notwithstanding those two authorities relied upon in the majority opinion of the Court, three justices of the Nebraska Court dissented for the reason that the Bulk Sales Act was never intended to thwart a creditor by complying with its terms from receiving a preference by payment of his debt in goods instead of in money.

In Georgia, in Sampson *v.* Brandon Gro. Co.,[20] although the case of Gallus *v.* Elmer is not cited in the opinion of the Court, from its language, it is evident its conclusion was reached by its aid. On p. 456 the Court says:

> "The manifest purpose of the act was to prevent the commission of fraud. This salutary object would not be attained,

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17. Gallus *v.* Elmer, supra, p. 107.

18. Supra.

19. Bailen *v.* Nebraska Imp. Co., 154 N. W. p. 850, citing Gallus *v.* Elmer, supra, and Sampson *v.* Brandon Gro. Co., 127 Ga. 454.

20. Supra.

if *sales* by the debtor to the creditor in extinguishment of his debt were accepted. * * * Such sales are void unless there be a compliance with the terms of the Act of 1903."

While the Nebraska Court went out of its way to specify trustees in deeds of trust for certain creditors when that question was not before it, the Georgia Court has confined its opinion to the right of a creditor to receive a preference by surrender of a stock of goods in extinguishment of a debt, which, it curiously denominated a sale. Since that case was decided, the Georgia Court has said:

"Sales in Bulk Act Civ. Code 1910 Sec. 3226 being in derogation of the common-law right to alienate property without restriction, is to be strictly construed." [21]

"The words 'sell, transfer or assign' * * * do not authorize the corporation to trade, or barter away for anything, other than for *money*." [22]

Where no money passes by a creditor to the debtor it is not a sale as that word was used in the Bulk Sales Act or in its ordinary legal sense, and so it is held: "A transfer to a creditor in payment of his debt is held not to be a *sale* under the Bulk-Sales Act." [23]

"We cannot agree with the complainant's contention that the *surrender* of the stock of merchandise under the circumstances amounted to a *sale* within the common acceptation of that term, or that it operated to transfer the entire title for an agreed consideration in violation of the Sales in Bulk Act." [24]

"The Bulk Sales Act has no application to a chattel mortgage of a stock of goods given in good faith for a valuable consideration and duly recorded." [25]

"The transfer of property to a wife in satisfaction of her debt was not a preference prohibited by law." [26]

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21. Yancey *v.* Lamar-Rankin Drug Co., 140 Ga. 359.
22. Germer *v.* Triple State, etc., 54 S. E. 509.
23. Peterson *v.* Dank, 43 Wash. 251.
24. Symons Bros. & Co. *v.* Brink (Michigan), 160 N. W. 638.
25. Mills *v.* Sullivan, 222 Mass. 587.
26. Compton *v.* Deitlien, 118 La. 369.

The Michigan Court in Youghiogheny *v.* Anderson [27] upon holding that a deed of assignment was void, said it was void both under the Bulk Sales Act and its insolvency laws for the reason that no bond was given and for failure to file the deed within ten days with the Clerk, and on p. 1026 went on to say: "It is therefore unnecessary to decide whether the Sale in Bulk Act applies to and governs a valid assignment for the benefit of creditors."

But the latter question has come squarely for decision before Courts of last resort in Colorado, Washington and Missouri, and these Courts hold without dissent that there need be no compliance with the Bulk Sales Act in assignments for the benefit of creditors.

> "Where a merchant conveyed his stock of merchandize in trust to a trustee to protect all his creditors, and the price received on a sale by the trustee was a full and fair value of the goods, the transaction was not in violation of the Bulk Sales Law." [28]

> "But our conclusion may be rested on another ground. We held in McAvoy *v.* Jennings, 44 Wash. 79, that a common-law assignment by a failing debtor of his stock of merchandize for the benefit of his creditors, or such of them as should comply with certain specified conditions, was not a *sale* within the meaning of the Bulk Sales Law; that the object of the Bulk Sales Law was to prevent the vendor, generally a retail merchant, from escaping his responsibilities to his creditors by disposing of all his stock, pocketing the proceeds and leaving his creditors without redress, and that no such result followed where the property was disposed of so as to make it available to his creditors." [29]

In applying the Missouri Bulk Sales Act the Court, in Anderson *v.* Cleveland,[30] says:

> "Anderson was owner of the store consisting of a small stock of groceries and became indebted to various persons, mostly wholesale merchants. On September 14, 1910 he gave a chattel deed of trust to Capron, trustee, to secure these creditors the amounts owed them.

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27. 152 N. W. 1025.

28. Banks Tea & Coffee Co. *v.* Sergeant, 141 Pac. 468.

29. Kasper *v.* Spokane Merchant's Ass'n, 151 Pac. p. 800.

"A debtor owner of a stock of groceries who had given a deed to secure creditors had a right to prefer some creditors to others, and was not guilty of fraud in selling the goods (himself) and applying the proceeds to the payment of some of his debts."

To require a creditor or the trustee in a deed of assignment for the benefit of creditors to comply with the terms of the Act in giving notice before taking possession, would take it from the power of the debtor to make, and destroy the right of the creditor to receive and enjoy, a preference which is the law of Virginia. It would place it in the power of the creditor who was not preferred to substitute for the lien by contract under the deed of trust, a lien by attachment, or fieri facias. In actual practice if the Bulk Sales Law were applicable, the favored creditor would be prejudiced by the act of the debtor, unless he rejected the preference and proceeded by attachment or fieri facias to outstrip the swiftest creditor.

The title of the Act shows that it was aimed at fraud and not intended to prevent bona fide transactions, whether by way of chattel mortgage, or mortgage deed of trust, or a surrender to a creditor in extinguishment of his debt. There is nothing in the language of the body of the Act which would indicate that its purpose was to abolish deeds of trust on any character of property where made with preferences, and such preferences could not be enjoyed in a scramble for priority, certainly not under the deed of trust, by which it was intended to create a lien by contract between the debtor and creditor on a stock of merchandize.

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30. 186 S. W. 1142-43.